No. 317

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

CRITES, INCORPORATED,

Petitioner,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, RICHARD SIMKINS, GEORGE FLORENCE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PRUDENTIAL INSURANCE COMPANY OF AMERICA, RICHARD SIMKINS, GEORGE FLORENCE,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Crites, Incorporated, an Ohio corporation, respectfully shows to this honorable court:

(A)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The opinion of the circuit court of appeals (R. 387-393) is reported in the advance sheets, 134 F. (2) 925.

The controversy which the petitioner now brings to this court had its origin in eleven consolidated foreclosure suits, involving eleven adjoining farms in Madison County,

Ohio, brought by Prudential Insurance Company of America against petitioner. Richard Simkins and George Florence were appointed co-receivers of the mortgaged farms and the petitioner now complains of the conduct of the receiver Simkins in connection with the foreclosure sale.

The indebtedness on the eleven mortgages aggregated $223,742.32 (R. 25-26) and the decrees of foreclosure provided that the farms should be sold at a minimum bid of two-thirds of the appraised value (R. 25, 26). The appraisers appointed by the marshal fixed the value at $244,080 (R. 26), or $20,337.68 in excess of the mortgage indebtedness. However, after postponement of the sale for more than a year ostensibly to await a better market (R. 128), Prudential bid in the mortgaged farms at minimum bid of $164,000 (R. 32) and then took a deficiency decree for $64,000 (R. 31-32). As afterwards learned by the petitioner, when Prudential took its deficiency decree it already had in hand a contract for the sale of the farms—*procured by the receiver Simkins before the foreclosure sales*—at $249,000 cash, or $25,000 more than the entire mortgage indebtedness (R. 288, 289, 61-3, 154-5).

The ultimate purchaser of the farms was William Proctor, a stranger to the foreclosure proceedings. His agent in the transaction was E. F. Jones. Unknown to the court, or to the co-receiver, or to the petitioner, Simkins entered into a contract of employment with Jones under which Simkins was to procure the farms for Jones' principal, William Proctor, and Jones was to pay Simkins a share of his commissions (R. 147, 206-7). Pursuant to his secret deal with Jones, Simkins negotiated a written agreement with Prudential, contingent upon acquisition of title by Prudential at the impending foreclosure sale, for sale to Jones of the eleven farms plus the receivers' one-half interest in the growing crops at cash price of $249,

000 (R. 288, 61-3, 154-5). Earnest money was deposited on this agreement in the sum of $3,000 (R. 212).

The reason why Jones sought the cooperation of the receiver Simkins, rather than to bargain directly with the owner of the equity, may be traced to the fact that only two years previously Jones had made an offer for these same farms, on behalf of another client, of $500,000 and this offer had been rejected (R. 201-202).

Immediately upon confirmation of the marshal's sale to Prudential, the mortgagee conveyed the eleven farms to Mary Johnston as Proctor's nominee (R. 312, 325). The deed carried revenue stamps indicating a consideration of $281,000, which was $117,000 more than Prudential's bid at the foreclosure sale and $56,000 more than the mortgage indebtedness. Jones received from Proctor one commission check for $15,000 and another of approximately $10,000 (R. 219). Jones paid Simkins some $2,797 (R. 273-4), and Simkins paid Harrison, then acting as counsel for Prudential as well as the co-receivers, $500 (R. 274).

In addition to his side deal with Jones, Simkins had fee-splitting agreements with Ingalls and Harrison, co-counsel for the plaintiff. On the eve of the filing of the foreclosure suits, Simkins and Ingalls agreed between themselves that Simkins should be appointed receiver, that Ingalls and Harrison would become counsel for the receiver as well as for the plaintiff, and that Simkins and Ingalls would split fees (R. 109, 113, 223). Shortly after the commencement of the suits, the court entered an order on the receivers' *ex parte* application appointing Ingalls and Harrison as attorneys for the receivers (R. 12-13). The opinion of the circuit court of appeals is obviously in error in stating that no such order was entered (R. 388-389). Ingalls received $1100 as a retainer from Prudential and split this fee with Simkins (R. 112, 279). When Simkins received his compensation from Jones, on the

sale of the farms by Prudential to Proctor, he paid part of this compensation to Harrison (R. 274).

There is no explanation of the difference between the contract price of $249,000 and the actual sale price of $281,000, although it seems inferable that the difference of approximately $32,000 represents commissions and expenses paid by the buyer.

To the receivers' amended accounts, the petitioner filed exceptions seeking to surcharge Simkins with the secret commissions received from Jones, with the amount of Jones' profit, and with the amount of the loss to the petitioner of the value of its equity caused by Simkins' breaches of trust in concert with Prudential and Jones. The petitioner also objected to the credits taken by Simkins in the accounting as compensation for his own services (R. 50-63).

The district court consolidated the causes as one (R. 367-8) and in substance concluded as a matter of law "that the conduct of receiver Simkins was objectionable in that it was open to, and did cause, criticism which, as an officer of this court, it was his duty to avoid" but constituted no breach of duty or misconduct to justify his surcharge or the disallowance of his credits objected to (R. 103), and, hence, overruled petitioner's objections to the special master's report, adopted the master's findings of fact and conclusions of law, approved the amended accounts, and dismissed the petitioner's exceptions for want of equity (R. 371-2).

The circuit court of appeals, on appeal, amended the order by disallowing the compensation granted to Ingalls by the district court and affirmed the order as amended (R. 387, 393). While it branded the agreement between Simkins and Ingalls as reprehensible (R. 392), it did not require Simkins to repay any part of the money he had received and retained as receiver's compensation. Petitions for rehearing were denied (R. 423).

(B)

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred by Section 240(a) of the Judicial Code as amended by Act of Feb. 13, 1925 (28 U. S. C., Sec. 347(a)), making it competent for this court on the petition of any party in any civil case in a circuit court of appeals to require by certiorari after judgment of such court that the cause be certified to this court for determination by it with the same power and authority and with like effect as if the cause had been brought by unrestricted appeal.

The judgment of the circuit court of appeals for the sixth circuit, amending and, as so amended, affirming the order of the district court appealed from, was entered April 12, 1943 (R. 387).

Petitions for rehearing were filed in due time and upon consideration all were, on June 3, 1943, denied (R. 423). This petition is filed within three months therafter as prescribed by the Act of Feb. 13, 1925, Ch. 229, Sec. 8, 43 Stat. 940 (28 U. S. C., Sec. 350), and *Bowman* v. *Loperena*, 311 U. S. 262, 266, and cases therein cited.

(C)

QUESTIONS PRESENTED.

(1) May a receiver, pending the sales of farm property in his custody under foreclosure proceedings in a district court, secretly represent and be paid by a prospective purchaser in purchasing such property for him from the plaintiff, the mortgagee, for a cash price in excess of the mortgage encumbrance, without making disclosure to the court or the owner of the equity of redemption of all material facts?

(2) If the receiver thereby be guilty of breach of his trust, is he (a) entitled to compensation for his services as receiver, and (b) is he accountable for the secret compensation paid him by his employer, or the profits gained by him and his associates, or the loss to the petitioner of the amount of the consideration paid, or at least of the appraised value of the property, in excess of the amount of the adjudicated mortgage encumbrance?

(3) Is a receiver entitled to any compensation as receiver, where he has entered into a secret agreement with plaintiff's attorney in advance of suit for a division of all fees they both might receive?

The district court at Columbus, Ohio, and the circuit court of appeals for the sixth circuit answered these questions adversely to the petitioner.

(D)

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1) The questions presented are of paramount importance in the administration of receiverships whenever resorted to in civil actions in the United States district courts. Unless the decisions below be reviewed and corrected, the integrity of receiverships in such proceedings is impugned.

(2) The application of the principles underlying *Jackson* v. *Smith*, 254 U. S. 586, which were disregarded by the courts below, would probably lead to a different result.

(3) Otherwise, the circuit court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or, has so far sanctioned a departure by the district court from the accepted or usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

(E)

PRAYER.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable court, directed to the United States circuit court of appeals for the sixth circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9333, *Crites, Incorporated, Appellant* v. *Prudential Insurance Company of America and Richard Simkins and George Florence, as co-receivers, Appellees,* and that the said judgment of the United States circuit court of appeals for the sixth circuit may be reversed by this honorable court, and that your petitioner may have such other and further relief in the premises as to this honorable court may seem meet and just; and your petitioner will ever pray.

CRITES, INCORPORATED

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion (R. 387-393) of the United States circuit court of appeals for the sixth circuit is reported in the advance sheets in *Crites, Inc.* v. *Prudential Insurance Co. of America, et al.*, 134 F. (2) 925.

II.

STATEMENT OF THE CASE.

The material facts with reference to the origin and history of the case, jurisdiction and the issues and questions presented have been stated in the preceding petition.

III.

SPECIFICATION OF ERRORS TO BE URGED.

(1) The circuit court of appeals erred in affirming the order of the district court as modified.

(2) The circuit court of appeals erred in not reversing the order of the district court with directions to surcharge the receiver Simkins with the amount of moneys Simkins received as compensation from Jones, with the amount of the profits or commissions paid to Jones, and with the amount of the price paid by Proctor for the eleven Madison County farms, in excess of the decretal indebtedness, or at least their appraised value in excess of such indebtedness.

(3) The circuit court of appeals also erred in not reversing and directing that credit to the receivers for compensation to Simkins for his services as receiver be disallowed and that Simkins repay into court the moneys paid to or retained by him therefor.

IV.

ARGUMENT.

(A)

The questions presented are of paramount importance in the administration of receiverships whenever resorted to in civil actions in the United States district courts. Unless the decisions below be reviewed and corrected, the integrity of receiverships in such proceedings is impugned.

The questions here involved will call for this honorable court's authoritative pronouncement,—nationwide in effect and scope,—of the extent of the fiduciary obligations and the consequent liability for a breach thereof by one occupying a federal office, namely, a receiver appointed in a mortgage foreclosure proceedings by a district court of the United States in the exercise of its jurisdiction and authority under the Constitution and laws of the United States. Compare *Texas & P. Ry. Co.* v. *Cox*, 145 U.S. 593, 603; *Ex Parte Tyler*, 149 U.S. 164; *Gillis* v. *State of California*, 293 U.S. 62, 65.

Since there is no federal statute determinative of the subject, general equitable principles, as determined by this court, will govern, similarly as in *U. S.* v. *Howard*, 302 U.S. 445, where, because of the question's importance, certiorari was granted to determine the official duty of a receiver with respect to his choice of depositories for moneys belonging to a fiduciary estate.

According to the decisions below, as long as the receiver is not charged with its sale, he is free to secretly serve strangers in their acquisition of property in his custody and to bargain for and receive an independent compensation for his efforts.

It would be unseemly not to require of a receiver, as an officer and arm of the court appointing him, like high standards, complete impartiality and full and frank disclosure of all material facts to all parties litigant as was required of fiduciaries by this court in *American United Mut. Life Ins. Co.* v. *City of Avon Park*, 311 U.S. 138, *Woods* v. *City National Bank* v. *Trust Co. of Chicago*, 312 U.S. 262 and *Pepper* v. *Litton*, 308 U.S. 238.

(B)

The application of the principles underlying Jackson v. Smith, 254 U.S. 586, which were disregarded by the courts below, would probably lead to a different result.

When decisions of the courts below have disregarded principles established by this court, certiorari has been granted. See *Fisher* v. *United Life Ins. Co.*, 314 U.S. 549 and *Helvering* v. *Horst*, 311 U.S. 112, 114, and compare *Armour & Co.* v. *Ft. Morgan S.S. Co.*, 207 U.S. 253, 257.

In *Jackson* v. *Smith*, 254 U.S. 586, a note secured by a trust deed was among the assets of an equity receivership administered in the District of Columbia supreme (now district) court. The receiver requested the trustee under power of sale in the trust deed to foreclose the real estate security. At the public sale conducted under the trustee's supervision by an auctioneer, the receiver's associates over competition purchased the property pursuant to an agreement to share the profits with him. This was held to be a violation of the receiver's fiduciary obligation; and the receiver's accounts were charged with the profits later realized, and judgment as at law also rendered against the receiver's associates therefor. On appeal, the judgment was reversed, 48 D.C. App. 565.

The court of appeals, like the court below in the case at bar, rested its decision on a lack of duty with respect to the conduct of the public sale (p. 577).

On certiorari to this court, the judgment of the court of appeals was reversed and that of the supreme court affirmed.

In *Jackson* v. *Smith* the receiver was not the seller at the public sale. That the sale there was one under a power in a trust deed and not a judicial sale is also no point of distinction, for in *Starkweather* v. *Jenner*, 216 U.S. 524 (the only case in this court relied on by the court below in *support* of its decision), this court expressly held (p. 528) no such distinction existed.

The emphasis of the court below on judicial sales, we respectfully submit, discloses an erroneous conception of the law,—for it is not the character of the sale which determines the fiduciary's right or the propriety of his conduct, but rather the *absence* of a conflicting duty.

In *Re Marquette Manor Bldg. Corporation*, 97 F. (2) 733, certiorari denied *sub nom. The National Builders Bank of Chicago* v. *Brown*, 305 U.S. 648, the circuit court of appeals for the seventh circuit followed *Jackson* v. *Smith* and applied its salutary principle to a bank acting as a depositary. The decision of the court below is in direct conflict with it in principle.

The point in *Jackson* v. *Smith*, as in the case at bar, is that a conflict of personal interest with a fiduciary duty was created. Such was the situation with Simkins.

Had the courts below given weight to *Jackson* v. *Smith* and the principles there enunciated, they would have denounced Simkins' dealings and his acceptance of employment and compensation from Jones, agent of the prospective purchaser, as being in conflict with a receiver's duties of impartiality, loyalty and disclosure.

(C)

Otherwise, the circuit court of appeals has decided an important question of federal law which has not been but should be, settled by this court, or, has so far sanctioned a departure by the district court from the accepted or usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

This court has had a similar question before it on but two occasions, namely, in *Baker* v. *Schofield*, 243 U.S. 114 and *Jackson* v. *Smith*, 254 U.S. 586. In the former the receiver conducted the sale, in the latter the sale was conducted by an impartial trustee. The result was nevertheless the same in both cases, liability was imposed because of the receivers' improper conduct.

The weight of authority condemns Simkins' dealings and is opposed to the decisions of the courts below. *Cook* v. *Martin*, 75 Ark. 40, 45-47 (rehearing granted on other grounds); *Herrick* v. *Miller*, 123 Ind. 304; *Re Sheets Lumber Co.*, 52 La. Ann. 1337; *Donahue* v. *Quackenbush*, 62 Minn. 132, 75 Minn. 43; *Shadewald* v. *White*, 74 Minn. 208; *Ravlin* v. *Chicago, A. & DeK. R.R. Co.*, 297 Ill. 131; *Thompson* v. *Halladay*, 15 Or. 34, 55; *Carr* v. *Houser*, 46 Ga. 477; *Bolles* v. *Duff*, 54 Barb. (N.Y.) 215; *Nugent* v. *Nugent*, (1907) 2 Ch. 292, aff'd (1908) 1 Ch. 546; *Alven* v. *Bond*, Flanagan & Kelly's Rep., 196; *Eyre* v. *M'Donnell*, 15 Ir. Ch. Rep. 534; *Boddington* v. *Langford*, 15 Ir. Ch. Rep. 558; *Anderson* v. *Anderson*, 9 Ir. Eq. Rep. 23; *U. S. F. & G. Co.* v. *Minnehoma Oil Corp.*, 116 Okla. 10; *Johnson* v. *Gunter*, 6 Bush (59 Ky.) 534.

Reeves v. *Crum*, 97 Okla. 293, relied on by the courts below, cited no authority in support of its ruling on the question at issue, and being in conflict with the great weight of authority is not entitled to serve as a precedent govern-

ing the propriety of the conduct of a federal court officer. The issues in that case and the scope of review were limited.

As to the last question, the fee division agreement between Simkins, the receiver, and Ingalls, the court below branded it as reprehensible. In applying *Woods* v. *City National Bank & Trust Co.*, which it held controlling of the situation, it deprived Ingalls of any additional compensation but permitted Simkins to retain his. It would appear that the illegality of the agreement is not apportionable, and the right to compensation, if denied one, should be denied both. The vice lay particularly with Simkins who initiated it (R. 109) and who was influenced by it in his subsequent conduct as receiver.

CONCLUSION.

The standards required of a trustee are most effectively stated by Mr. Justice Rutledge in *Earll* v. *Picken*, 113 F. (2) 150:

> (p. 155) "The foundation of the rule is the trustee's obligation of undivided loyalty to the trust. He cannot deal with it at arm's length or in the mores of the market place. Acquisition of an adverse interest interjects self-interest into a relation with which it is wholly incompatible and dilutes the allegiance of confidence with self-preservation. That others may purchase the security and take full advantage of their bargain, that the *cestui* has not the means to do so, or that the trustee might do so if he were not trustee, does not destroy the obligation or permit him to subject it to 'the "disintegrating erosion" of particular exceptions.' By accepting the trust he disqualifies himself to accept such a bargain and the disqualification continues while the trust remains. • • •

(p. 156) "The rule may be a vestigial reflection of a ancient morality. But whether so or not, the old lin should be held fast which marks off the obligation c confidence and conscience from the temptation induce by self-interest. He who would deal at arm's leng must stand at arm's length. And he must do so open as an adversary, not disguised as confident and pr tector. He cannot commingle his trusteeship wi merchandising on his own account. No device c concealment, whether in the use of straw men or othe wise, can legitimate such a miscegenation."

We respectfully submit that the questions presented t this petition are of nation-wide importance and of fa reaching consequences—striking at the very integrity c the federal courts in their resort to the remedy of receive ships frequently employed,—making them worthy of th honorable court's deliberation and determination.

Respectfully submitted,

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